91-1521

IN THE UNITED STATES SUPREME COURT

(9)

UNITED STATES OF AMERICA

v.

LOWELL MICHAEL GREEN

No.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Lowell M. Green, by and through his previously appointed counsel asks this Court for leave to proceed in forma pauperis in connection with the above-captioned action. An affidavit complying with 28 U.S.C. §1746 is attached in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. Respondent alerts this Court that he was previously represented

by appointed counsel before the District of Columbia Superior Court and the District of Columbia Court of Appeals.

Respectfully submitted,

Joseph R. Conte
Bond, Conte & Norman
601 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 638-4100
Counsel for Respondent

Dated: April 24th, 1992

IN THE UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA v. LOWELL MICHAEL GREEN	No.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Lowell M. Green, being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. I am not presently employed. I have not been employed since 1988 and the amount of the salary and wages which I received at that time were $400.00 per month.

2. I have not received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources.

3. I own only 100.00 in cash and I do not own a checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. Following is a list of persons who are dependent on me and their relationship to me:

____

____

____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Washington, D. C.
Washington, D. C.
District of Columbia

Lowell Green
Lowell M. Green

SUBSCRIBED AND SWORN TO before me this 6TH day of April, 1992.

My Commission Expires July 14, 199[illegible]

Subscribed and sworn to before me
[illegible] April 19[illegible]
[illegible]
Notary Public, D.C.

QUESTION PRESENTED

Whether the concerns that empowered both Miranda and Edwards are implicated when the police reinitiate interrogation of a defendant who has been in continuous custody for months undergoing observation to determine his eligibility for favorable sentencing and when the defendant has previously indicated he wishes to deal with law enforcement authorities only through counsel.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

UNITED STATES OF AMERICA

v.

LOWELL GREEN, Respondent

RESPONSE TO A PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Joseph R. Conte, the undersigned counsel, on behalf of Mr. Lowell Green, respectfully responds to the Government's petition for a writ of certiorari challenging the judgment of the District of Columbia Court of Appeals in this case.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reported at 592 A.2d 985.

JURISDICTION

The court of appeals entered judgment on May 31, 1991. The Government's petition for rehearing was denied on November 25, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

COUNTERSTATEMENT

Mr. Green was in custody at the Department of Corrections Youth Center facility pending sentencing on a plea bargained charge of attempted possession with intent to distribute cocaine. He was undergoing a sixty-day observation period to determine his eligibility for favorable sentencing under the District of Columbia Youth Rehabilitation Amendment Act of 1985. (App. A,

infra, 2a; see D.C. Code Ann. § 24-803(e) (1989). Mr. Green had requested counsel earlier in connection with police-initiated interrogation and he was represented by counsel throughout his past dealings with the police. (App. A., infra, 2a) His routine at the Youth Facility included arising around 8:30 a.m., attending schooling programs, and meeting with his C&P officer regarding the likelihood of his sentencing determination. (App. C, infra, Tr.I p. 56)

At around 4:00 a.m. on January 4, 1990 and without any initiating activity on his part, Mr. Green was taken from his sleep and transported to the D.C. police station where he ultimately made incriminating statements. He arrived in Washington, D.C. at approximately 6:00 a.m. (App. C, infra, Tr.I p.56) He was held in the "bullpen" at the courthouse until 10:17 a.m., at which time two police officers took him into their custody. (The parties stipulated to this fact.) He was then placed in a paddy wagon where he stayed for more than an hour and a half. (App. C, infra, Tr.I p.58-60). After being transported to a police station at 300 Indiana Avenue, N.W., a short distance from the courthouse, Mr. Green was taken into the station (App. C, infra, Tr.I p.60), and for the first time he was advised of why he was brought there. Approximately nine hours had transpired since the initial intrusion into Mr. Green's sleep.

Detective Gossage told Mr. Green that he was "here for murder[ing Jamaican Tony]." Mr. Green asked for his lawyer. (App. C, infra, Tr.I p. 60) No lawyer was provided. Detective Gossage directed Mr. Green to "sign this," referring to a PD 47 rights card. (App. C, infra, Tr.I p.61-62) The detective told him, "You can make this hard on yourself or make it easy. We got you for Kevin Henson too, you are a suspect in that case. If you don't tell us something about Jamaican Tony, you are going to get charged for both of these cases." (App. C, infra, Tr.I p.62) Mr. Green was afraid. Id. He agreed to waive his rights and make a videotaped statement.

The officers videotaped Mr. Green admitting that he knew who the principal was in the murder of the Jamaican Tony murder, and implicating himself as a possible aider and abettor. Mr. Green was never provided with the assistance of counsel. The videotape clearly shows that the interrogation was without counsel present. (App. C, infra, 3a)

2. Mr. Green was indicted for murder. He moved to suppress his confession, claiming that it resulted in violation of Edwards v. Arizona, 451 U.S. 477 (1981) and Arizona v. Roberson, 486 U.S. 675 (1988). The trial court initially denied defendant's motion to suppress, basing its denial on (1) the

court's attribution of greater credibility to Detective Gossage,[1] and (2) the court's belief that the policies underlying the Supreme Court's decisions in the past would not be served by suppression of defendant's statement in this instance. (App. B, infra, 25a-26a)

Three days later the trial court reversed itself, following Minnick v. Mississippi, 111 S.Ct. 486 (1990). (App. B, infra, 31a-33a)

3. The District of Columbia Court of Appeals affirmed the trial court's final ruling. (App. A, infra, 1a-18a). The Court of Appeals relied on the policies underlying Edwards as they had been recently clarified in Minnick, 111 S.Ct. 486 (1990). It noted that "preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of Edwards and its progeny." (App. A, infra, 5a, citing Patterson v. Illinois, 487 U.S. 285, 291 (1988)) The court refused to follow the Government's argument that the inherent coercive pressures accompanying custody were not present under the facts of this case. (See App. A, infra, 9a-10a). Furthermore, the court of appeals found unpersuasive the fact that five months

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[1] This finding was not challenged on appeal. Instead, Mr. Green relied on the applicable law applied to the undisputed facts, i.e., that he was in custody, that he was represented by counsel, and that he responded to improper police-reinitiated interrogation.

transpired between the defendant's initial request for counsel in the drug-related matter and the more recent police-reinitiated interrogation. The court stated, "there is nothing in the lapse of time itself from which to deduce that [the defendant's] original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution." (App. A, infra, 10a) Indeed, the court noted that "it is just as likely that [the defendant's] sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with Government officials intensified." (Id., citing Minnick, 111 S.Ct. at 491 ("the coercive pressures that accompany custody . . . may **increase** as custody is prolonged.")). Finally, the Court of Appeals stated that if the court were to make an exception for this case then the issue of time would permanently muddy the "clear and unequivocal" Edwards rule. (App. A, infra, 10a)

REASONS FOR DENYING THE GOVERNMENT'S PETITION

The Government seeks to use this case as a vehicle to muddy the bright-line rule that police-initiated interrogation must cease after the suspect has requested the assistance of counsel.[2] In doing so, the Government egregiously misguides this Court on the scope of the protections afforded by the Miranda-Edwards rule and the voluntariness of Mr. Green's confession. First, the Government inaccurately states that the rule protects only the accused from police badgering. Second, by asserting that there was "no hint of coercion" in this case, the Government inaccurately states the facts. Each of these misstatements is addressed in the following paragraphs.

1. The Government inaccurately asserts that the Miranda-Edwards rule protects the accused only from police badgering. In doing so, it assumes that police badgering is an easily definable act which has easily definable effects on the free will of the accused. The Miranda-Edwards guarantee recognizes the inherently coercive nature of police methods and it preserves the accused's right to face police interrogation with the assistance of counsel. The rule is intended to preserve not only the accused's

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[2] Hereafter, the bright-line rule established under Miranda and Edwards is referred to as the "Miranda-Edwards" rule.

Fifth Amendment right against self-incrimination but all of humanity's interest in protecting against coerced and unreliable confessions. The "use of involuntary verbal confessions in criminal trials is constitutionally obnoxious" not only because of their unreliability but also because they "offend the community's sense of fair play and decency." Rochin v. California, 342 U.S. 165, 173 (1952) (J. Frankfurter); Miranda, 86 S.Ct. at 1619-20 (involuntary confessions offend notions of acceptability in a society which has rejected the inquisitorial method of prosecution); see Edwards v. Arizona, 451 U.S. at 484-86; Arizona v. Roberson, 486 U.S. at 681-82; Minnick v. Mississippi, 111 S.Ct. at 490. Cf. Moran v. Burbine, 475 U.S. at 425-26; Kamisar, Inbau & Arnold, Criminal Justice in Our Time 19-36 (Howard ed. 1965) (providing the history of Miranda-Edwards rule).

The Government's analysis of the rule ignores the principal policy behind the rule, namely, to assure that only voluntary confessions are part of the judicial process. Police methods are inherently coercive. Indeed, maintaining an authoritarian edge is a goal of the law enforcement system. See, e.g., Escobedo v. Illinois, 378 U.S. 478 (1964) (recognizing that police interrogation methods are inherently coercive); Miranda v. Arizona, 384 U.S. 436, 444-58 (1966) (enumerating many ways in

which custodial interrogation is inherently coercive and violative of an individual's right to be free of coerced self-incrimination); Edwards v. Arizona, 451 U.S. 973 (1981) (reconfirming the Court's earlier views on police coerciveness and establishing a bright-line rule); Smith v. Illinois, 469 U.S. 89 (1984) (reconfirming the need for a bright-line rule barring police-reinitiated interrogation when an accused requests counsel); Moran v. Burbine, 475 U.S. 412, 426 (1986) (reconfirming the Court's recognition of the inherently coercive interrogation process in the context of suspect's initiation of a voluntary waiver). Because police methods are inherently coercive, this Court has determined that the best way to ensure the voluntariness of confessions is to provide a bright-line rule. The bright-line rule provides clear and unequivocal guidance to the Government and especially law enforcement personnel, inhibiting their professional incentives to reinitiate interrogation. That bright-line rule holds inadmissible any confessions resulting from police-reinitiated interrogation. Edwards v. Arizona, 451 U.S. 477 (1981) (establishing bright-line rule; Arizona v. Roberson, 486 U.S. 675 (1988) (recognizing that the bright-line rule benefits the Government by providing certain procedures); see Minnick v. Mississippi, 111 S.Ct. 486 (1990) (reconfirming that the accused's initial request for an attorney

is determinative); McNeil v. Wisconsin, 111 S.Ct. 2205, 2209 (1991) (reconfirming that the Miranda-Edwards guarantee protects the suspect's desire to deal with the police only through counsel).

2. The Government asserts that the bright-line rule is burdensome to law enforcement and results in the suppression of some confessions even though these confessions were obtained "without any hint of coercion or police overreaching." (Govt's Petition at 6) It is difficult to imagine a situation where the police do not improperly influence an accused's decision when, knowing that the accused has asked for the assistance of counsel, the police reinitiate interrogation. This Court has recognized for a long time that the interest in effective law enforcement does not rest on coerced confessions, and that uncoerced confessions following an accused's request for counsel are tainted by the inherently coercive atmosphere of police methods and the custodial environment. The bright-line rule provides specificity, and the resulting gain in specificity outweighs the burdens that the Miranda-Edwards rule imposes on law enforcement. Fare v. Michael C., 442 U.S. 707, 718 (1979); Minnick, 111 S.Ct. at 490.

3. The Government cites the following facts as distinguishing this case from the policies underlying the

Miranda-Edwards line of cases: (1) the defendant had previously pled guilty as a result of a plea bargain to the pending drug charge, (2) the defendant had been in custody for five months in connection with a pending drug charge, and (3) the defendant had been assisted by counsel prior to the police reinitiated interrogation on the new murder charge. Each of the three factors is addressed in turn.

(a) The entry of a guilty plea in a first matter does not negate an accused's right to choose not to incriminate himself in another matter until sentencing in the first matter is complete. As in most cases, Mr. Green's entry of a guilty plea in the drug-related case represented his decision in favor of accepting the Government's bargain after weighing the benefits of a jury trial against the benefits of the plea bargain. However, a plea bargain is final only if the sentencing judge determines it is fair in light of a myriad of related factors. Numerous cases demonstrate that a plea bargain is not final unless and until both sides fully perform and the court accepts the terms of the bargain. See, e.g., Santobello v. New York, 404 U.S. 257 (1971) (Government breached agreement at sentencing allowing defendant to reinstate not guilty plea); Ricketts v. Adamson, 107 S.Ct. 2680 (1987) (defendant breached agreement allowing

Government to fully prosecute); F.R.Cr.Pro. 32(d)[3] (guilty plea may be withdrawn for any fair and just reason before sentence is imposed); see also Rice v. Olson, 324 U.S. 786 (1945) (entry of guilty plea without counsel is not necessarily a waiver of Fifth Amendment rights). In sum, the entry of a guilty plea does not trigger a pivotal break in the process negating the accused's Miranda-Edwards rights; instead, it merely demonstrates a good-faith step in the bargaining process. When Mr. Green was interrogated on the murder-related matter, the sentencing judge had not yet finally accepted the terms of the bargain.

Even the entry of a guilty plea would not, absent an agreement to the contrary, give the police the right to interrogate a defendant after he or she enters a plea of guilty. In instances where the prosecutor seeks the assistance of the accused in prosecuting other individuals or solving other crimes, express provision is made in the plea agreement. Normally such assistance requires some additional consideration, for example, promises that the prosecutor will make the defendant's

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[3] Compare D.C. Superior Court Rule of Criminal Procedure 32(e).

> **Withdrawal of guilty plea.** A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea.

cooperation known to the sentencing judge or that the Government will not prosecute the defendant for those crimes in which he or she assists the police. Absent any written agreement, these promises are made part of the record at the time the defendant enters the guilty plea. (In instances where the defendant agrees to cooperate against his co-accused, the agreements normally provide that sentencing of the defendant will be continued until after he or she fully performs in accordance with the agreement. The defendant is represented by his counsel during the entire process; counsel ensures that the prosecutor performs in accordance with the agreement).

Moreover and as the District of Columbia Court of Appeals recognized, a defendant's guilty plea results from the advice and assistance of counsel, which is consistent with the defendant's original election to deal with Government officials only through an attorney. (App. A, infra, 13a-14a) Indeed, from Mr. Green's viewpoint the fact that counsel negotiated a plea to a lesser charge possibly sparing him a mandatory-minimum sentence in the drug-related case probably confirmed the wisdom of his choice of insisting on the shield of legal representation. Id. As the court of appeals noted, on these facts it is better to assume that the defendant chose the shelter afforded by the Miranda-Edwards guarantee. To hold otherwise would be

inconsistent with Mr. Green's prior election to communicate with the police only through counsel. Id. In sum, the fact that Mr. Green had entered a guilty plea in the pending drug charge did not trigger a pivotal break in events in the adjudicatory process warranting an exception to the Miranda-Edwards guarantee.

(b) The Miranda-Edwards rule protects the accused for so long as he or she may be subjected to law enforcement interrogation methods. The Government asks this Court to make an exception to the bright-line Miranda-Edwards rule because five months transpired between Mr. Green's initial request for an attorney in the drug-related matter and the time the police reinitiated interrogation in the murder-related matter. As support for this position, the Government relies on the assumption that the custodial process diminishes in effectiveness over time, resulting in the accused's enjoyment of free will even if he or she does not enjoy freedom. (Gov't Petition at 11) Clearly this assumption runs counter to the goals ascribed to by the law enforcement custodial system. It is unlikely that the custodial administrators intend for the defendant's submission to diminish over time. In this particular case, since Mr. Green was undergoing observation at the time to determine his eligibility for favorable sentencing treatment, it is likely that he felt

that his cooperation with police at the expense of his own rights was compelled to further his chances for favorable sentencing.[4]

In addition, even if Mr. Green had developed a comfortable feeling while in custody, that feeling was seriously intruded upon when he was rousted out of bed at 4:00 in the morning because the police wished to have him downtown. Certainly, since Mr. Green was already in custody, this extraordinary intrusion into his routine at the Youth Facility was unnecessary; Mr. Green was not going anywhere. As the police knew at the time and in accordance with their training, their authoritarian edge was magnified by their ability to intrude on Mr. Green's peace of mind and stable routine. This kind of police maneuvering was precisely the subtle coercion recognized by the Miranda Court. 384 U.S. at 448-58, 448n8 (recognizing that police methods are inherently coercive and citing several police manuals encouraging coercive tactics). Contrary to the Government's assertion, this case is an example of why the Miranda-Edwards guarantee is properly tethered to custody and not time. To hold otherwise by following the Government's argument

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[4] At the time of his interrogation, Mr. Green did not confess to committing the murder. He admitted that he knew who committed the murder and in doing so, implicated himself as a possible aider and abettor. Mr. Green is not sophisticated. The likelihood that he realized the criminal import of his admissions at the time of police-reinitiated interrogation is slim.

would muddy the bright-line rule and serve as a flag to law enforcement authorities, alerting them that over time they may exert overt influence over the accused's initial refusal to communicate without counsel present.

(c) The fact that the defendant spoke with counsel prior to police reinitiated interrogation does not constitute a pivotal break in the protections afforded by the Miranda-Edwards rule. The Government maintains that because Mr. Green had previously consulted with his attorney concerning a charge unrelated to the one in issue when the police reinitiated interrogation, his invocation of his Miranda-Edwards rights were negated. In doing so, the Government tries to erode the teachings of this Court and muddy the specificity of the Miranda-Edwards rule. See Arizona v. Roberson, 487 U.S. at 682 (rejecting the argument that the Miranda-Edwards rule "should not apply when the police-initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation."); Minnick v. Mississippi, 111 S.Ct. at 491 (clarifying Edwards' intent that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."); see also App. A, infra, 7a (D.C. Court of Appeals opinion in this case, affirming Miranda-

Edwards rule's application to this case). This Court has addressed this issue in the past and has ruled that the accused's right to have counsel present is not satisfied merely because the accused has had a prior opportunity to speak with counsel. The accused's request for counsel at interrogation serves as a request to be represented by an agent in dealing with law enforcement authorities. The agency relationship is not satisfied when the accused's right to representation is intermittent and beyond his influence. Moreover, consultation is not always effective in instructing the accused of his rights. Minnick v. Mississippi, 111 S.Ct. at 490-91. In sum, once the Fifth Amendment right to counsel is invoked, the accused has the right to have counsel **present** at police interrogation unless by his or her own unfettered activity, the accused waives that right. Id.

4. The Government also asserts that the Miranda-Edwards rule causes confusion in federal and state courts. In doing so, the Government cites pre-Minnick cases and compares them with post-Minnick cases. See Gov't's Petition at 13 (comparing pre-Minnick cases United States v. Hall, 905 F.2d 959, 962-63 (6th Cir.1990), cert. denied, 111 S.Ct. 2858 (1991), and State v. Newton, 682 P.2d 295, 297-98 (Utah 1984) with post-Minnick cases Kochutin v. State, 813 P.2d 298 (Alaska 1991); Walker v. State,

573 So.2d 415 (Fla.Dist.Ct.App.1991); and Commonwealth v. Perez, 581 N.E.2d 1010 (Mass.1991)). The inconsistency of which the Government alerts this Court was settled in 1990. See Minnick v. Mississippi, 111 S.Ct. 486 (1990); Kochutin v. State, 813 P.2d 298 (Alaska 1991); Walker v. State, 573 So.2d 415 (Fla.Dist. Ct.App.1991); Commonwealth v. Perez, 581 N.E.2d 1010 (Mass. 1991). Despite the Government's assertion, the courts do not appear to need a restatement of the Miranda-Edwards rule.

CONCLUSION

Because the Miranda-Edwards rule has evolved as a bright-line rule protecting the accused and the public from coerced confessions, and because this case demonstrates the desirability of that bright-line rule, Respondent asserts that the wisdom of the existing rule should be maintained and that certiorari to the District of Columbia Court of Appeals should be denied.

Respectfully submitted,

Joseph R. Conte
Member of the Bar of this Court
Appointed for Respondent

April, 1992

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PROOF OF SERVICE

I, Joseph R. Conte, do swear or declare that on this date, April 24, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached RESPONSE TO A PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and address of those served are as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Office of the U.S. Attorney
Appellate Division
555 Fourth Street, N.W.
Washington, D.C. 20001

Joseph R. Conte
Bond, Conte & Norman
601 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 638-4100
Counsel for Appellant

APPENDIX A:

United States Court of Appeals' Findings

ADDENDUM

Appendix A:
District of Columbia Court of Appeals' Findings

Appendix B:
D.C. Superior Court's Findings
B(i): November 28, 1990 Initial Findings
B(ii): December 4, 1990 Final Findings

Appendix C:
Trial Record References

APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 91-29

UNITED STATES, APPELLANT

v.

LOWELL GREEN, APPELLEE

Argued April 17, 1991

Decided May 31, 1991

Before ROGERS, Chief Judge, and STEADMAN and FARRELL, Associate Judges.

FARRELL, Associate Judge:

The government appeals from an order suppressing the confession of appellee (hereafter defendant) in this murder prosecution. The trial judge ruled that the police, in eliciting the confession, violated the prophylactic rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), as further explained in *Minnick v. Mississippi*, —— U.S. ——, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). The government argues that suppressing the confession in this case amounts to a wholly unwarranted extension of the *Edwards* rule to circumstances presenting none of the concerns that impelled that decision or its sire, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16

L.Ed.2d 694 (1966). The government's argument has force, as the trial judge recognized; but like the trial judge we conclude that the Supreme Court's teachings in this area so far do not countenance a departure from the "bright-line" rule of *Edwards* in the present circumstances. We therefore uphold the suppression of defendant's confession.

I.

Defendant originally was arrested on July 18, 1989, on a charge of possessing a controlled substance with intent to distribute. He signed a police advice-of-rights (PD 47) form that day and answered "No" in writing to the question whether he was willing to answer questions without having an attorney present. Defendant was presented in court the next day and an attorney was appointed to represent him. He was held on bond until July 28, 1989, when the drug case was dismissed at preliminary hearing. It appears that he was then remanded to the custody of juvenile authorities, presumably in connection with a juvenile matter pending against him at the time. He was subsequently indicted on the drug charge, but failed to appear for his arraignment on August 22, 1989, apparently because he was in the custody of juvenile authorities. When eventually located, he was arraigned in the drug case on September 7, 1989. A bond was imposed and he remained in custody on the bond until September 27, 1989, when he pled guilty to the lesser included offense of attempted possession with intent to distribute cocaine. Following the plea, he was held in the Youth Center at the Lorton Reformatory while a Youth Act Study (D.C.Code § 24-803(e) (1989)) was conducted. On February 26, 1990, he was sentenced to fifteen months' incarceration under the Youth Act.

Meanwhile, on January 4, 1990, while defendant was at Lorton, Detective Donald Gossage of the Metropolitan Police Department obtained an arrest warrant charging him with the murder of Cheaver Herriott on December 30, 1988. Also on January 4, Detective Gossage obtained an order directing that defendant be brought up the next day from the Youth Center to be booked and formally presented on the murder warrant. On January 5, defendant was brought to the police Homicide Office to be booked. Detective Gossage advised him of his *Miranda* rights by reading to him both sides of the PD 47 form. Defendant chose to waive his *Miranda* rights, so indicating by his answers to four questions on the form. After he discussed with Gossage his involvement in the murder of Cheaver Herriott, defendant was again advised of his rights and agreed to make a videotaped statement, in which he confessed involvement in the robbery and killing of Herriott.

Following his indictment on April 17, 1990 on various charges including first-degree murder, defendant moved to suppress his confession on several grounds, chief among them that it had been obtained in violation of *Edwards v. Arizona*, *supra*, in view of his original refusal—at the time of his arrest on the drug charge—to answer questions without counsel being present. The trial judge heard testimony and initially denied the motion to suppress, concluding that "none of the reasons which underlie [the Supreme] Court's decision[s] which have addressed a criminal defendant's right to [counsel] under the 6th Amendment and his right not to incriminate himself under the 5th Amendment[] would be served by suppression" of defendant's murder confession.[1] The judge em-

[1] The government argues, and we agree, that this case presents no issue of violation of defendant's right to counsel under the Sixth Amendment. *See, e.g., Illinois v. Perkins*, —— U.S. ——, 110 S.Ct. 2394, 2399, 110 L.Ed.2d 243 (1990); *United States v. Gouveia*, 467 U.S. 180, 187-88, 104 S.Ct. 2292, 2296-98, 81 L.Ed.2d 146 (1984); *Woodson v. United States*, 488 A.2d 910, 912 (D.C. 1985).

phasized three points. First, an "extraordinary amount of time [over five months] . . . [had] elapsed between" defendant's invocation of rights in the drug case and his waiver of rights in connection with his confession to murder. Second, although he was under some form of restraint of liberty during the entire five or more months, during the last part of that period he was not being held in jail but rather in the presumably less coercive environment of the Youth Center. Finally, defendant had had the opportunity to consult repeatedly with counsel during the period between his invocation of rights in the drug case and his waiver of rights before his murder confession.

Three days after the court's initial ruling, however, the Supreme Court decided *Minnick v. Mississippi*, *supra*. The judge reconsidered his ruling on the Fifth Amendment issue in light of *Minnick*, noting in particular that the "most significant[]" ground of his ruling had been the appointment of counsel and the opportunity defendant had had to consult counsel in the months prior to the reinitiation of questioning by the police—a factor specifically addressed by *Minnick*, and held not to justify a departure from *Edwards*. On the strength of *Minnick*'s specific holding and its reaffirmation of the "bright-line" test established by *Edwards*, the judge reversed his earlier ruling and ordered the confession suppressed.[2] The government

[2] The trial judge adhered to his previous rejection of defendant's claims that his confession was involuntary in fact

noted this timely appeal. D.C.Code § 23-104(a)(1) (1989).

II.

In *Edwards v. Arizona* the Supreme Court held:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation, even if he has been advised of his rights. . . . [A]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1884-85. "Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny." *Patterson v. Illinois*, 487 U.S. 285, 291, 108 S.Ct. 2389, 2394, 101 L.Ed.2d 261 (1988). The Court has further explained that "[t]he merit of the *Edwards* decision lies in the

and that it was obtained during an unnecessary delay in bringing defendant to court. *See Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501 (1988). On appeal defendant does not argue the constitutional involuntariness of the confession as an alternative ground supporting the suppression ruling. He does raise the issue of unnecessary delay, but we reject that claim as did the trial judge. *Bliss v. United States*, 445 A.2d 625, 633 (D.C. 1982), *cert. denied*, 459 U.S. 1117, 103 S.Ct. 756, 74 L.Ed.2d 972 (1983). *See* Super.Ct.Crim.R. 5(a).

clarity of its command and the certainty of its application," *Minnick*, 111 S.Ct. at 490: "the *Edwards* rule provides 'clear and unequivocal' guidelines to the law enforcement profession," *id.* (citation and additional internal quotation marks omitted), and it "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Id.* at 489.

The government, while acknowledging these purposes of the rule, reminds us that the *Edwards* holding, like the seminal rule of *Miranda*, "is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose." *Connecticut v. Barrett*, 479 U.S. 523, 528, 107 S.Ct. 828, 832, 93 L.Ed.2d 920 (1987). The government points to the Court's statement that "*Edwards* is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489 (quoting *Michigan v. Harvey*, 494 U.S. 344, ——, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990)); "[t]he rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures." *Id.* The government then mounts a multipronged case for holding that the circumstances of this case insure both that defendant was not "badgered" into revoking his initial election to communicate with police only through counsel and that "the coercive pressures of custody were not the inducing cause" of his confession. *Id.* at 492.

First, the government points out that the police reinitiated questioning only after defendant had been furnished counsel and consulted with him in the drug case, and that the renewed questioning concerned a crime entirely unrelated to the one regarding which

defendant had refused to talk without counsel.[3] These considerations alone cannot support the government's argument. In *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988), the Court rejected the argument that the *Edwards* rule "should not apply when the police-initiated interrogation following a suspect's request for counsel occurs in the context of a separate investigation," *id.* at 682, 108 S.Ct. at 2098; "unless he otherwise states, there is no reason to assume that a suspect's state of mind is in any way investigation-specific" when, by requesting an attorney, he has demonstrated his belief "that he is not capable of undergoing [custodial] questioning without advice of counsel." *Id.* at 684, 108 S.Ct. at 2099 (citations omitted), at 681, 108 S.Ct. at 2097. Here, defendant's insistence on answering questions only with counsel present was unqualified. *Compare Roberson* with *Connecticut v. Barrett*, *supra*.

Similarly, in *Minnick* the Court clarified *Edwards*' intent that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation *without counsel present*, whether or not the accused has consulted with his attorney." 111 S.Ct. at 491 (emphasis added). The Court rejected the argument that an intervening "opportunity to consult with an attorney outside the interrogation room" was sufficient. *Id.* at 490. In this case it is undisputed that defendant did not have counsel present when Detective Gossage reinitiated questioning.

The government endeavors to narrow *Roberson* and *Minnick* to their individual settings. As in *Edwards* itself, it says, the accused in *Roberson* was

[3] Defendant does not dispute that the drug offense to which he pled guilty was factually unrelated to the December 1988 murder that was the subject of his confession.

"denied the counsel he [had] clearly requested" until after the police reinitiated interrogation. 486 U.S. at 686, 108 S.Ct. at 2100. As in *Edwards* too, *Minnick* involved questioning about the same offense which the accused had refused to discuss without counsel being present. The absence of both these factors in this case, the government submits, takes it outside the reach of *Edwards* and its progeny; in particular, as the trial judge found, defendant had had repeated opportunity to consult counsel before the police approached him about the murder. But if *Edwards*, *Roberson* and *Minnick* together teach anything, it is the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel, reflecting "his own view that he is not competent to deal with the authorities without legal advice," *Roberson*, 486 U.S. at 681, 108 S.Ct. at 2098 (citation omitted). The Supreme Court having made clear that police-initiated questioning about a separate offense and questioning after opportunity to consult counsel each fails to justify departure from *Edwards*' "bright-line, prophylactic . . . rule," *id.* at 682, 108 S.Ct. at 2098, we are not convinced that in combination the Court would regard these two factors differently.

The government next distinguishes the *Edwards* line of cases based upon the sheer length of time between defendant's invocation of the right to counsel and the initiation of questioning about the unrelated homicide offense. There is no question that to the extent *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Minnick*, 111 S.Ct. at 489,[4]

[4] "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations

that danger is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights. *Edwards*, the government argues, rests on the assumption that repeated attempts to initiate questioning will "exacerbate" the "compulsion to speak" already felt by one "who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel," *Roberson*, 486 U.S. at 686, 108 S.Ct. at 2100; and that compulsion must be substantially lessened when the police have avoided all efforts to question the person without counsel for so long a period of time.

These are substantial arguments, but there are weighty considerations on the other side of the ledger as well. Although the trial judge attached significance to the fact that defendant apparently was in the presumably less coercive environment of the Youth Center during much of the five to six-month period, the government concedes on appeal "that defendant in this case was in continuous custody for purposes of the *Edwards* prophylactic rule" (Brief for Appellant at 21 n. 16).[5] In *Minnick*, although the

that the interrogation will continue until a confession is obtained." *Minnesota v. Murphy*, 465 U.S. 420, 433, 104 S.Ct. 1136, 1145, 79 L.Ed.2d 409 (1984) (citing *Miranda*, 384 U.S. at 468, 86 S.Ct. at 1624).

[5] That concession, which as we understand it relinquishes any argument based on differing degrees of coerciveness in the custodial environment for purposes of this appeal, is probably well-advised. Although courts have recognized that different kinds of custody can be more or less coercive with regard to the possibility of self-incrimination, *see Smith v. United States*, 586 A.2d 684, 685 (D.C. 1991), the record in this case contains sparse indication of the circumstances in which defendant's liberty was restrained at the Youth Center,

relevant interval was only a matter of days, the Court emphasized "the coercive pressures that accompany custody and that may *increase* as custody is prolonged." 111 S.Ct. at 491 (emphasis added).[6] Moreover, except for his ongoing contacts with his custodial caretakers, we must assume that defendant's only contact with law enforcement officials (investigators and prosecutors) during this period was through, or in the presence of, his attorney. Hence there is nothing in the lapse of time itself from which to deduce that his original belief in his vulnerability to the pressures of custodial interrogation had diminished as he progressed through the steps of pleading guilty to the (lesser included) offense of attempted drug distribution; it is just as likely that his sense of dependence on, and trust in, counsel as the guardian of his interests in dealing with government officials intensified.

Furthermore, with the government's argument based upon the lapse of time we are again met with the Supreme Court's insistence that the *Edwards* rule be kept "clear and unequivocal." If five months in custody without evidence of police "badgering" is held sufficient to dispel *Edwards*' presumption that any new waiver of rights is involuntary, then why not three months or three weeks? At what point in time—and in conjunction with what other circum-

an issue on which the government—with superior knowledge of the circumstances—presumably bore the burden of production, if not proof, below.

[6] *See also Arizona v. Roberson*, *supra*, 486 U.S. at 686, 108 S.Ct. at 2100 (pointing to the "serious risk that the mere repetition of the *Miranda* warnings would not overcome the presumption of coercion that is created by prolonged police custody").

stances—does it make doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part? The government is candid in admitting that a focus on the lapse of time—three days versus three weeks versus three or five months—risks obscuring *Edwards*' lucid rule, but argues that this reversion to *some* sort of case-specific consideration of circumstances is inevitable if *Edwards* is not to become a caricature of itself on facts such as presented here. In his dissent in *Minnick* Justice Scalia likewise scorned what he termed the "perpetual irrebutable presumption" erected by *Edwards* and its progeny, necessitating the same result if the intervening period "had been three months, or three years, or even three decades." 111 S.Ct. at 496.[7] Ultimately, given its emphasis on the need for a bright-line rule in this area, we think only the Supreme Court can explain whether the *Edwards* rule is time-tethered and whether a five-month interval, during which no efforts at custodial interrogation took place, is too long a period to justify a continuing irrebuttable presumption that any police-initiated waiver was invalid. Until the Court provides further guidance, we are persuaded that so long as

[7] *Amicus* the Public Defender Service points out that even if *Edwards*' presumption of involuntariness is unaffected by the passage of time or later events, it rationally "can apply only to crimes which have already occurred [and not to future crimes,] since the suspect cannot possibly be asserting a right to refuse to answer questions which could not possibly be posed." PDS thus disputes the notion that the *Edwards* rule, unless in some way time-restricted, admits of no "reasonable limiting principle." The government essentially replies that this limitation to crimes already committed is small comfort to "the public's [legitimate] interest in the investigation of criminal activities." *Maine v. Moulton*, 474 U.S. 159, 180, 106 S.Ct. 477, 489, 88 L.Ed.2d 481 (1985).

the defendant remains in custody the fact that the police did not reinitiate interrogation until five months after he invoked his right to counsel cannot be adequate reason, alone or combined with the factors already treated, to justify a departure from *Edwards*' command.[8]

The government, however, has saved what might seem to be its most potent argument until last, one that promises adherence to the requirement of some form of bright-line rule. Although defendant was still in custody awaiting sentencing when the police reinitiated questioning, he had pled guilty months earlier in the drug case that caused his arrest and invocation of rights. As the government points out, *Edwards* itself does not make its prophylactic ban permanent: the accused can lift it by reinitiating conversation with the police about the crime. Similarly, several courts have held that *Edwards*' presumption of involuntary waiver fades when the accused is released from custody.[9] The government urges that, so too, "the defendant's knowing, voluntary, and intelligent decision [here], arrived at with the advice of counsel, to plead guilty to the drug offense represents a break in events sufficient to sever

[8] Strictly speaking, we have no occasion to decide whether different considerations would come into play if the defendant, although still in custody, were transferred to the general prison population following imposition of sentence. Appellant remained in custody pending sentence on the drug charge at the time the police approached him about the murder.

[9] *E.g., Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983); *People v. Trujillo*, 773 P.2d 1086, 1091-92 (Colo. 1989) (en banc).

any link between the defendant's invocation of his *Miranda* right to counsel in connection with the drug case and police interrogation about the entirely separate crime of murder." Just as the prosecution may show "a sufficient break in events to undermine the inference that [a] confession was caused by [a] Fourth Amendment violation," *Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985), so the knowing, voluntary and intelligent waiver of Fifth Amendment protections represented by a presumptively valid guilty plea undermines the assumption that a subsequent waiver of *Miranda* rights was the product of police coercion.

There is no question that defendant's intervening plea of guilty distinguishes this case factually from *Edwards* and succeeding cases, and it is also true that in important respects "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973). Nevertheless, we must decide whether by pleading guilty in the drug case defendant can be said to have "reopened the dialogue with the authorities" within the meaning of *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1885, n. 9, so as to validate his waiver of rights and interrogation on the murder charge. Defendant points out that he retained his privilege against self-incrimination on the drug charge until sentencing,[10] but that fact is not decisive; the police had little interest in gathering additional evidence of the drug charge. Rather, the answer is implicit in our foregoing discussion. Defendant pled guilty with the advice and assistance of coun-

[10] *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Boswell v. United States*, 511 A.2d 29 (D.C. 1986).

sel. Hence while the knowing and voluntary plea presumably demonstrated that acceptance of personal responsibility and not the pressures of custody caused him to incriminate himself, it also was consistent with his original election to deal with government officials only through an attorney. Indeed, from defendant's viewpoint the fact that counsel had negotiated a plea to a lesser charge sparing him a mandatory-minimum sentence, D.C. Code § 33-541(c)(1)(A) (1990 Supp.), would only have confirmed the wisdom of his choice to insist on the shield of legal representation. If defendant had other criminal involvement to conceal, or if he merely feared that he would be wrongly implicated in crimes committed by someone else, in either case we must assume he chose the shelter afforded by *Miranda* and *Edwards* to insure that the coercive pressures of custody did not cause him to incriminate himself. Defendant's plea of guilty in the drug case, because it is consistent with his election to communicate with the police only through counsel, cannot be the pivotal break in events that *Edwards* demands before a waiver can be regarded as an initial election by the accused to deal with the authorities on his own.

III.

The *Edwards* rule, like the rule of *Miranda* itself, remains "an auxiliary barrier against police coercion," *Connecticut v. Barrett*, 479 U.S. at 528, 107 S.Ct. at 832 (emphasis added). Hence it is not unfair to question the logic of a presumption that renders invalid an otherwise knowing, intelligent and voluntary waiver of *Miranda*'s auxiliary protections—and so demands exclusion of a murder confession voluntary in fact—because over five months earlier, in connection with an unrelated crime, the defendant

asked for (and was afforded) the assistance of counsel. But this Court's task is to construe the teachings of the Supreme Court as faithfully as it can in constitutional matters. In this case we have tried not to rely merely on "broad language" in *Edwards*, *Roberson* and *Minnick* which the government admits tends to neutralize the distinguishing features of this case,[11] but instead to ask whether, fundamentally, the Court would regard the custodial circumstances of this case as presenting a "situation[] in which the concerns that powered [both *Miranda* and *Edwards*] are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437, 104 S.Ct. 3138, 3149, 82 L.Ed.2d 317 (1984). In *Minnick* the Court summarized those concerns and purposes, stated that "[t]he *Edwards* rule sets forth a specific standard to fulfill these purposes," and admonished that "we have declined to confine [the rule] in other instances," *Minnick*, 111 S.Ct. at 492 (citing *Roberson*). On balance, we are left unpersuaded that the Court would confine it in the present situation either, despite the accumulation of distinguishing features the government can point to. If that judgment is wrong, then it is for the Court in this case or some future one to provide the *Leitfaden*—the red thread—through its decisions leading to the correct result.

The order suppressing defendant's confession is

Affirmed.

[11] In general, the Supreme Court has cautioned that "words of . . . opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading." *Armour & Co. v. Wantock*, 323 U.S. 126, 133, 65 S.Ct. 165, 168, 89 L.Ed. 118 (1944); *see also Air Courier Conference of America v. American Postal Workers Union*, —— U.S. ——, 111 S.Ct. 913, 920, 112 L.Ed.2d 1125 (1991).

STEADMAN, Associate Judge, dissenting:

The bottom-line issue in this appeal is the degree to which the rule of *Edwards* and its progeny is to extend durationally beyond the paradigm situation involved in those cases: prearraignment continuous custody by arresting officers. *See Minnick v. Mississippi*, —— U.S. ——, 111 S.Ct. 486, 492, 112 L.Ed.2d 489 (1990) ("[w]e are invited by this formulation to adopt a regime in which *Edwards*' protection could pass in and out of existence multiple times prior to arraignment, at which point the same protection might reattach by virtue of our Sixth Amendment jurisprudence").

As reiterated in *Minnick*, the protection of *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," and "to ensure that any statement made in subsequent interrogation is not the result of coercive pressures." 111 S.Ct. at 489 (citation omitted). It seems to me that the government is correct in its assertion that when an event occurs which represents a sea change in those circumstances which existed at the time the right to counsel was originally invoked, the irrebuttable presumption against a voluntary waiver of the *Miranda* right to counsel should likewise cease. I believe the Supreme Court would so rule.[1] *Cf. Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 1291, 84 L.Ed.2d 222 (1985) (prosecution may show "a sufficient break in events to undermine the inference that [a] confession was caused by [a] Fourth Amendment violation"); *Miranda v.*

[1] I recognize that Justice Scalia in his dissent in *Minnick* characterizes the majority as announcing a "perpetuality of prohibition", 111 S.Ct. at 496, but that interpretation does not, of course, speak for the full court.

Arizona, 384 U.S. 436, 496, 86 S.Ct. 1602, 1639, 16 L.Ed.2d 694 (1966) (requirement of a break in the stream of events).

It is conceded that *Minnick* constitutes no bar to questioning about a crime occurring *subsequent* to the invocation of the right to counsel. Far short of that, a number of cases have recognized that where a suspect has been released from custody and subsequently again detained, even for the same crime, an invocation of the right to counsel during the original confinement does not prevent the police from seeking a waiver of such a right upon the new confinement. *See, e.g., Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir.1988), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir.1982), *cert. denied*, 463 U.S. 1229, 103 S.Ct. 3569, 77 L.Ed.2d 1410 (1983).[2]

Similarly, I believe that the government is correct in its assertion that when a defendant has pled guilty to the charge which prompted the invocation of the right to counsel, circumstances have so significantly changed that any coercive effect created by the original confinement must be deemed to have been dissipated, certainly with respect to questioning about an entirely separate and distinct crime. A suspect's concern about self-incrimination that may exist during pre-trial detention must be dramatically affected once, with the advice and assistance of counsel and subject to the elaborate protections provided by Rule

[2] Here, for several months following his invocation of the right to counsel, appellant as a juvenile was apparently held not in any jail or prison as such but rather was in the custody of juvenile authorities. Nonetheless, the government for purposes of this appeal assumes that the appellant was in continuous custody for purposes of the *Edwards* prophylactic rule, and I deal with the appeal on that basis.

11, he has appeared in court and been convicted from his own mouth. Such an event entailing a knowing, voluntary and intelligent waiver of the Fifth Amendment right against self-incrimination and its consequent concerns—the very right that *Edwards* seeks to protect—should undermine any irrebuttable presumption that a subsequent waiver directed toward an entirely unrelated crime is the product of continuing police coercion. I would so hold.

APPENDIX B:

D.C. Superior Court's findings
B(i): November 28, 1990 Initial Findings
B(ii): December 4, 1990 Final Findings

APPENDIX B(i)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No. F 265-90

UNITED STATES OF AMERICA

vs.

LOWELL GREEN, DEFENDANT

Washington, D. C.

Wednesday, November 28, 1990

The above-entitled action came on for a motions hearing before the Honorable HENRY KENNEDY, Associate Judge, in Courtroom Number 102 commencing at approximately 11:40 a.m.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH CONTE, Esquire
Washington, D. C.

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THE COURT: The matter presently before the Court is the Defendant's Motion to Suppress the statements which the Government indicates it wishes to use as evidence in this case, some of which were videotaped on January 5th, 1990.

The Court has reviewed the papers filed in connection with this motion and considered the argument of Counsel and has had an opportunity to consider the testimony of the witnesses.

Initially the Court knows that its ruling as to whether Mr. Green's statement was given voluntarily and after being given and then waiving his Miranda Rights depends upon its assessment as to the credibility of the witnesses.

There are only three possible alternatives as to what happened after Mr. Green was brought to the Homicide Office of the Metropolitan Police Department shortly after eleven o'clock a.m. on January 5th, 1990.

Mr. Green's account, Detective Gossage's account or a scenario which might emerge from the different accounts of the two.

The Court has no reason to discern a scenario which is different from that of Mr. Green and Detective Gossage. And as between those two accounts, that is the account given by Mr. Green and Detective Gossage, the Court credits Detective Gossage's account for the following reasons and based upon the following factors.

One. Nothing which he said is inherently [in]-credible. Two. While Detective Gossage does have a professional interest in this case and indeed, is in the business of ferr[e]ting out crime as he had been in January of 1990 for seventeen years, that interest pales when compared with the interests of Mr. Green in giving testimony which would serve his interests

in having this very damaging piece of evidence, or pieces of evidence, suppressed.

Three. Mr. Green has been previously convicted of a crime, a fact which the Court may and does consider in assessing his credibility.

And four, the evidence which is present for all to see and hear which contradicts some of Mr. Green's sworn testimony at the Motions Hearing.

For example, when questioned at the motions hearing whether he had received lunch at the police station he indicated unequivocably that he had not.

This conflict[s] absolutely and without explanation with his statement made on the videotape that he had been given lunch. At the motions hearing Mr. Green was questioned as to whether he was threatened, he indicated that he had been.

The threats, I suppose, that are being referred to is the threat of receiving—being charged with two offenses unless he gave a statement.

On the videotape, while it's not quite so clear as to what was meant and so it's not as clear[ly] in conflict as the testimony concerning the giving of the lunch, he testified that he had not been threatened.

The Court has reviewed the deposition of Ms. Mary Taylor and with respect to that testimony simply does not attach the same significance to it as Mr. Green does.

In any event, it's clear that Ms. Taylor is not able to [in]voke either Mr. Green's 5th or 6th Amendment right no[r] to have Counsel. Having made this credibility finding which leads the Court to conclude that Mr. Green was brought to the Homicide Office of the police department, was given his Miranda Rights in the way in which Detective Gossage testified they were given on the stand, that Mr. Green understood

his rights and that he appreciated them and thereafter waived them, the Court finds no basis to suppress any of these statements on the ground that they were given in violation of Miranda or were involuntarily made.

To move to the next prong of the Defense argument, the Court is of the view that a very very serious question is raised as to whether these statements should be suppressed as a result of the Supreme Court holdings in Roberson vs. Arizona, unlike the case of Espinosa, to which reference has been made, sets forth controlling preceden[t] for this Court.

Roberson vs. Arizona—Arizona vs. Roberson extended the rule of Arizona vs. Edward[s] which held that a suspect who has "expressed his desire to deal with the police only through Counsel is not subject to further interrogation by the authorities until Counsel has been made available to him unless the accused himself initiates further communications."

In Roberson, the accused was arrested on the scene for a just completed burglary and indicated that he did not wish to speak with the authorities without a lawyer.

Three days later while the accused was still in custody pursuant to the arrest three days earlier, a different police officer inquired about another burglary that had been committed the day before the suspect was arrested.

This officer, that is, the second interrogating officer, had given the Defendant his Miranda rights which presumably were effective in the absence of the Supreme Court's ruling that the giving of the rights w[as] ineffective as a matter of law.

To advise the Defendant of his rights under the 5th and 6th Amendment the Supreme Court held that

the rule which it had laid down in Arizona vs. Edwards applied and required suppression of the Defendant's statement. And the fact that the subsequent interrogations by the police concern[ed] an offense unrelated to the prior offense about which the suspect refused to speak without a lawyer, or that the second interrogating official did not know that the suspect had earlier requested a lawyer before speaking with the police, did not matter.

The Court emphasized the fact that the presumption raised by a suspect's request for Counsel that he considers himself unable to deal with the procedures of custodial interrogation without legal assistance does not disappear simply because the police ha[ve] approached the suspect still in custody, still without Counsel, about a separate investigation.

In this Court's view the provision of Counsel to Mr. Green prior to his interrogation in this case is a significant and dispositive factual distinction which leads the Court to find that Arizona vs. Roberson does not require suppression of the statement.

The precise holding of Roberson is that a criminal suspect who has expressed a desire to deal with the police only through Counsel is not subject to further interrogation even with respect to a subsequent unrelated offense by the authorities until Counsel has been made available to the suspect or unless the suspect initiates further communications.

The Court admits that there are broad statements of law set forth in Roberson which if followed to the letter would require suppression of the Defendant's statement in this case.

For example, the Supreme Court discussed at length the case of Edward[s] vs. Arizona. The Court in Roberson noted that in Edwards it reconfirmed the view which it had expressed in Miranda, the views

expressed—its views expressed in Miranda and to lend substance to such views "emphasized that it is inconsistent with Miranda and its progeny for the authorit[ities] at their instance to reinterrogate an accused in custody if he has clearly asserted his right to Counsel.

We concluded that interrogations may only occur if the accused himself only initiates further communication."

The Court also expressed "that if a suspect believes that he is not capable of undergoing such questioning without advice of Counsel, then it is presumed that any subsequent waiver that has come at the authorities['] bequest and not the suspect's own instigation is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect."

Moreover this Court, as it stated during the course of argument in this case, is given reason to pause by the d[iss]ent of Justice Kennedy in the Roberson case which anticipated precisely the significance of the majority decision in Roberson for the factual scenario which is presented here.

A[c]knowledging its concern, the Court is reminded of the words of our Court of Appeals in the case of Craft vs. Craft and the Supreme Court's decision in Armour vs. Waintok, Craft vs. Craft, Armour vs. Waintok. Neither of these are criminal cases, the cites are Craft vs. Craft, 155 At.2d. 910, a 1959 case. Armour, A-r-m-o-u-r and Company vs. Waintok, 323 U.S. 126, a 1944 case.

"It is well to remember that significance is given to broad and general statements of law only by comparing the facts from which they arise with those facts to which they supposedly apply.["]

The record in this case memorializes the great difference between the factual scenario in Roberson and that of the case at bar. Among those are one, the extraordinary amount of time which elapsed between Mr. Green's invocation of his desire to speak only with Counsel present in July of 1989 and the subsequent waiver of such right—in excess of five months later in January of 1990.

Two. Unlike in Roberson, Mr. Green was not continuously in custody of the police and therefore arguably subject to the same coercive pressures in January 1990 as he was in July of 1989.

In fact, Mr. Green was in the custody of the Department of Corrections during the last portion of the time between July 1989 and January 5, 1990 and not with the police during the course of his testimony. Mr. Green gave some hint as to what his day-to-day life was like at the Youth Center.

That is, he was being studied for a Youth Act study. He had to get up to go to his programs. The point is that unlike the cases that have dealt with this issue, Arizona vs. Edwards and Roberson vs. Arizona, the Espinosa case and there are other cases none really on point as much on point as those that I have discussed, it simply cannot be said that there was the same type of custody.

But most important that it just can't be said that the same coercive pressures were at stake. But most significantly, of course, and the l[i]nch pin, it seems to me of the Court's decision in Arizona and the one which the Court finds dispositive in this case along with the others, is that Mr. Green in fact had been appointed an attorney in July of 1989 with whom he could have talked had he decide[d] to do so when he was asked in January of 1990 whether he was willing to talk with a lawyer.

The Court notes that the Supreme Court has never said that the investigative technique of questioning suspects is a tainted process. Under the facts of this case unless the technique itself is considered to be tainted, none of the reasons which underlie the Court's decision[s] which have addressed a criminal defendant's right to cancel [*sic*] under the 6th Amendment and his right not to incriminate himself under the 5th Amendment, would be served by suppression of these statements.

Moving on to the third prong of Mr. Green's argument in favor of suppression that his statements were taken in violation of 18 USC Code 3501C for [*sic*] D.C. Code, Section 140 and the principle set forth in the case of McNab[b] vs. United States and Mall[o]ry vs. United States.

The Court notes that the Defendant's argument in this regard depend[s] upon a finding that he was arrested at sometime other than when Detective Gossage informed Mr. Green that he was under arrest.

The Court is unable to be precise in its finding of when it is that Detective Gossage indicated that Mr. Green was under arrest. I simply failed to note it in my notes and do not have an independent recollection of when he said it was that he gave the specific time.

What he stated was that Mr. Green arrived at the Homicide Branch shortly—at 11 o'clock a.m. or shortly thereafter. That he exchanged what I would call a salutation with Mr. Green and told [him] that he would be with him later.

It is the Court's belief that Mr., based upon Detective Gossage's testimony, that Mr. Green was told that he was under arrest or was being placed under arrest about one-half to forty-five minutes later.

The Court is aware that the Rights Card was executed at 12:05, but I will go on and frankly, Counsel, if—I think you understand my ruling.

I credit Detective Gossage's testimony so it is what it is and so if there is in the record testimony as to when this man was placed under arrest, it speaks for itself. But I think that the Court announces of this will not—that it simply won't make any difference.

Even if the Court should determine that an arrest took place sometime prior to this time, that is, when Detecti[v]e Gossage says you are under arrest, it clearly would not have been before 10:17 a.m. when officers of the Metropolitan Police Department took Mr. Green from the custody of the United States Marshal service and it is clear that that is when the transfer took place.

The Court relies upon the—a paper which I don't know whether it bears a number or not which I think it should, but it's—it's a paper which has at the top United States—U.S. Department of Justice, United States Marshal Service, time out 10:17, and I do believe that this paper should be made part of the record, the Court has considered it.

It's at that time at the earliest, and the Court believes that it is probably the case that that is when the time should begin to run. It shouldn't be that an officer's statement, you are under arrest, provides the, you know, the time period.

It's that time when Mr. Green was taken into custody by the Metropolitan Police Department pursuant to an arrest warrant that had been previously sought and approved by a Judge.

Using the time of 10:17 at the earliest as a bench mark, Mr. Green began giving his statement after voluntarily waiving his rights not to speak at all or

without the presence of an attorney shortly after executing the PD47 at 12:05 p.m. within two hours of his arrest.

Having voluntarily beg[u]n his statement in the absence of Mr. Green's request to cease talking, the Court is unaware of any principle which would require the police to stop their questioning at 1:17 p.m. even if for the Court to determine that Title 4, D.C. Code Section 140 applies rather than 18 USC 3501C.

In the Court's view the videotaping was simply a continuation or memorialization of the same statement which Mr. Green gave to Detective Gossage that began sometime earlier. And again, the Court affixes that time at some time between 11:30 and 11:45.

With reference to the issue of which of the statutory provisions apply the Court would simply note that it is probable, it is probably the case the 18 USC 3501C rather than Title 4, Section 140 which applies in view of the fact that 350[1]-C is later in time and is the statutory provision which is specifically referred to [in] Rule 5A of this Court, the Court further doubts that the rule of lenity applies to the statute which governs the admissibility of evidence even if that evidence is evidence which [is] sought to be admitted in a criminal case as [im]pposed to statutes which set[] forth the elements of offenses and the punishment which might be opposed upon convictions of offenses.

The Court further notes that cases of United States vs. Pettyjohn which is good law in this jurisdiction hold that with respect to the Defendant's right to a speedy presentment before a magistrate, the Defendant's waiver of his 5th Amendment privilege also is a waiver of that right for the time, for that period of time when the statement is being made and that subsequent delay is not to be given retroactive effect.

The Court therefore denies for the reasons stated th[e] Defendant's Motion to Suppress the statements in this case. And while we are at this point, I believe it would be prudent to mark all of the matters to which the Court has indicated that it has taken into consideration but which perhaps formerly w[ere] not admitted into evidence.

I have in mind the booking order itself and the—I don't know what you would call this, it's a caption that reads, Prisoner Remand or Order to Receipt for United States Prisoner. That's at least what I would suggest.

The Court also, while it did not make reference to the form which sets forth the condition of release of Mr. Green in the July case, clearly indicates that he was appointed an attorney. At least that's what I believe should happen. I will hear what you have to say if you think not.

MR. CONTE: That's fine, Your Honor. My only problem is that I didn't know until—the issue of constant incarceration is just not an issue I was prepared to address. My client advises me that he was in fact in continuous incarceration from July 19th.

THE COURT: The record should be clear that that's what I had assumed.

MR. CONTE: The Court stated that he was not. I thought he was not either.

THE COURT: No, no, no, the Court assumes that from July 19, 1989 through January 5, 1990, he was in custody clearly, that is, that he was not free to go home.

The distinction the Court draws is between being in custody of the police, in the custody of the police, first of all, because he was not in the custody of the police, he was in the custody of the Department of Corrections and the kind of custody.

I mean, I just don't—this is a great case for great minds to draw these distinctions, you know. But it seems to me that it's a difference between always sitting at the jail three days, four days, and going down to the Youth Center, being talked with by psychiatrists, psychologists, and being involved in programs and so on and so forth.

That seems to me to be a different kind of custody. I did not mean to suggest or to find that Mr. Green was in—was free. That's not what the Court meant to say. All right. Anything else?

MS. PRAGER: No, Your Honor. I can't remember if Mr. Conte tendered the document or the Defense—it doesn't matter, we can have it marked as Government's or Defendant's exhibits. Mr. Conte knows which belongs to whom.

MR. CONTE: It does not matter for the record.

THE COURT: Let's call these Government's Exhibits and let's make sure that they are in the record and labeled correctly.

MR. CONTE: I suppose that the Rights Card from the July 19th, 1989 matter should be a part of the record and it's attached as an addendum in my motion.

THE COURT: Yes, I think that it should be. Do you have any objection to that?

MS. PRAGER: No, Your Honor.

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APPENDIX B(ii)

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No. F265-90

UNITED STATES OF AMERICA

vs.

LOWELL GREEN, DEFENDANT

Washington, D. C.
Tuesday, December 4, 1990

The above-entitled action came on for trial before the Honorable HENRY H. KENNEDY, Associate Judge, in Courtroom Number 102, commencing at approximately 10:16 a.m.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH R. CONTE, Esquire
Washington, D.C.

• • • • •

THE COURT: The Court is of the view that with the latest pronouncement from the Supreme Court, the highest Court of this land, given its interpreta-

tion of the decisions which preceded the case of *Arizona vs. Edwards*, that the decision requires suppression of the statement; that the Supreme Court has set up, as mandated, a bright, quote, unquote, bright line test, and that is one of the problems, in my view, of bright line tests. They kind of do not permit for the type of individual consideration of the facts which precedent, which do not set forth such bright lines permit.

The record is clear as to what the Court has found to be the case here. And I suppose what is required is that whenever a person is in custody, the police must check to see whether counsel has been appointed, and then before questioning that person, confer with counsel.

I believe that the Minnick Case requires this result, and so the Court reverses its ruling made on Friday and grants the motion, the defense motion to suppress the—all of the statements which were under consideration, both the oral statements to Detective Gossage, as well as the videotape memorialization of it. That's the Court's decision.

MS. PRAGER: Your Honor, given the Court's decision, the Government is requesting the 30-day continuance, which I believe we're entitled to to decide whether we're going to pursue an appeal.

THE COURT: All right. I don't have my calendar down here. Suggest a date in 30 days.

MR. CONTE: I would object, just for the record, Your Honor.

THE COURT: You object to?

MR. CONTE: I would object to any continuance. The jury is here. We haven't sworn them. We did request this Court swear the jury yesterday.

THE COURT: Yes. And I just smile, because,

boy, these rules are so complex. But, I think that the statute does permit the Government 30 days, does it not?

MS. PRAGER: Yes, Your Honor. And I think in this circumstance we can certainly—I'm personally certifying to the Court that the video taped statement is a substantial piece of evidence that the Government would use in its case-in-chief, and that this appeal, should it be taken, would not be taken for delay. And I think that with those representations, we are entitled to the 30-day continuance.

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PUBLISHER'S NOTE

THE FOLLOWING PAGE IS UNAVAILABLE FOR FILMING

Copies to:

Henorable Henry H. Greene

[Frederick Beane]
Clerk, Superior Court

John R. Fisher, Esquire
Assistant United States Attorney

Joseph R. Conte, Esquire
601 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004

James Klein, Esquire
Public Defender Service

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APPENDIX C:

Trial Record References

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA

vs. Criminal Action No. F 605-90

LOWELL GREEN,

Defendant

Washington, D. C.

Wednesday, November 28, 1990

The above-entitled action came on for a motions hearing before the Honorable HENRY KENNEDY, Associate Judge, in Courtroom Number 102 commencing at approximately 11:40 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HIS ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

LISA PRAGER, Esquire
Assistant United States Attorney

On behalf of the Defendant:

JOSEPH CONTE, Esquire
Washington, D. C.

RT

Mr. Robert L. Tanner
Official Court Reporter Telephone 879-1048

THE COURT: Does the Government have more evidence to present on this issue of the -- whether this tape can be shown to the jury?

MS. PRAGER: No, Your Honor, that concludes the Government's evidence.

THE COURT: Mr. Conte.

MR. CONTE: We call Lowell Green to the stand.

Thereupon,

LOWELL GREEN,

having been called as a witness for and on behalf of the Defendant, and having first been duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CONTE:

Q. Mr. Green, I am going to ask you to speak slowly and loudly enough so that everybody can hear you, okay?

A. Yes.

Q. Would you state your name for the record?

A. Lowell Michael Green, Jr.

Q. And where do you live?

A. 843 19th Street, N.E., apartment 3.

Q. And how long have you lived there?

A. Ten years.

Q. Okay. Mr. Green, I am going to draw your attention to January 5th, 1990. Do you recall where you

were at that date?

A. Yes.

Q. Where was that at?

A. I was detained at Youth Center One Correctional Facility on a 60-day E study.

Q. Okay. Now what if anything happened to you that day?

A. Early in the morning I was awakened to take to Court for I didn't know at the time. I asked why I was going and they said Court matters.

So when I got to the Court building at around six o'clock in the morning --

Q. Let me stop you right there. Do you know approximately what time you got up?

A. Four o'clock.

Q. Do you know approximately what time you got to Court?

A. About six o'clock in the morning.

Q. Now had you not had to come up to the Courthouse that day, what time would you have gotten up?

A. Round 8:30.

Q. And what would you have done the rest of the day?

A. Go to my programs as in schooling and go to see my C and P officer as -- to see if I am going to be recommended the Youth Act or recommended for probation.

Q. So the fact that you had to come to Court you were not able to do all the things you would have normally done that day, is that correct?

A. Yes.

Q. Now you got to Court approximately six o'clock?

A. Yes.

Q. And then what happened?

THE COURT: I assume six o'clock a.m. in the morning?

THE WITNESS: Yes. I got there six o'clock a.m. and so I stayed in the bullpen until about 9:45, 10 o'clock and that was rather late because everybody else leaves out about nine o'clock.

So I am waiting. So the Marshalls call my name and so I responded as I am here. So he called me up, he asked me to show him my arm band or if I had an ID card.

I showed him my ID card so he verified it, he seen it was me. I went around to the Marshall's desk and it was two police waiting there. So I asked them what was this pertaining about and they said "don't worry, you will find out when you get there."

So that was that. They signed the custody order and took me downstairs.

BY MR. CONTE:

Q. Did you see the custody order?

A. Yes, it's a little white block paper.

MR. CONTE: Court's indulgence.

(P A U S E)

MR. CONTE: May I have this marked?

(The document was marked as Defendant's Exhibit No. 2 for identification.)

BY MR. CONTE:

Q. Mr. Green, I show you what's marked as Defendant's Exhibit Number Two and ask you if you have ever seen that document before?

A. Yes.

Q. Could you tell that Court what that is?

A. A custody order from when one set of people take your custody from another set of people and he signed it.

I couldn't see the name that he signed because I was trying to look but I was behind him.

Q. Now after the officer signed the document, what happened?

A. They took me downstairs.

Q. Is that here in the Courthouse?

A. Yes, I went downstairs. As I was leaving to go somewhere, they put me in a paddy wagon. I waited in there about ten minutes and then we left. When we went out we made a left --

Q. Let me stop you there. Do you know where you

came out of?

A. The tunnel.

Q. All right.

A. On the end where 500 C Street office building is located.

Q. Okay. And go ahead, continue.

A. So when I came out, we made a left. Went up to the corner at the light and made another left and made a sharp left and went down because you can't see no more sunlight and you could tell you went underground. So I waited in there.

Q. Is that 300 Indiana Avenue?

A. Yes.

Q. All right.

A. So when I went down in the tunnel I waited in the back of the paddy wagon for about half an hour and they didn't take me in, I just sat in the back.

I heard them in the front of the wagon talking, but you can't hear what they are saying, you can just hear. So then we left and went back to the Court building.

Q. Is that without getting out of the paddy wagon?

A. Yes.

Q. All right.

A. So we got back to the Court building and we was under there. So I asked them when am I going to go where

I am going.

So they said don't worry, you are going to get there. So I waited another half an hour under there.

I went back up again, waited for a little while --

Q. Went back up where?

A. Back to 300 Indiana Avenue.

Q. All right.

A. I waited another half hour and then I finally went up. And then that's when I seen Detective Gossage.

Q. You know approximately what time that was?

A. That was approximately twelve o'clock.

Q. All right. And do you recall what kind of room you were in when you saw Detective Gossage?

A. It's an open space, it wasn't no room, just an open space. A unit with dividers everywhere when I first seen him. Then he took me into a room.

Q. What if anything did Detective Gossage say to you?

A. He just asked me how I was doing, I said fine. I asked him what I was here for. He said I am here for murder. I said where's my lawyer at? He should have known I was being brought up here if I went to Court. So he was not saying nothing.

He was trying to slide me a card saying "sign this, sign this!" So I was not signing, I was denying it.

So --

Q. Is that the PD47, the Rights Card?

A. Yes. So I was denying it. So we was just talking back and forth and he was trying to get me to sign it telling me about the case.

So I was pushing it away saying I don't want to sign it. So then he said "I am going to be frank with you. We got you for Jamaican Tony, we know you had something to do with Jamaican Tony."

He said "I know you didn't shoot him, but you had something to do with it." So I am just sitting there, I said I had nothing to do with it, I am denying all allegations. He said "we know your friend Timothy Williams did it.

So then we still talking and I still ain't signed the card yet. So he finally said "You can make this hard on yourself or make it easy. We got you for Kevin Henson too, you are a suspect in that case. If you don't tell us something about Jamaican Tony, you are going to get charged for both of these cases." So I got scared.

Q. And then what happened?

A. So he said -- he slid me the card. He said "you can make it easy for yourself, you can tell us something about this or you can tell us -- or get both of the charges."

So I didn't know what to tell him, I didn't know where to begin. So he told me that Tim did it, he knew Tim did it. So I am thinking if he knows Tim did it, why ain't you charge him without what I have to say.

So he said "yes, we know he got shot in the building" and whatever. So when he was saying that I wasn't getting charged for Henson's case, I was thinking that's one less off my hands and so that's when I signed the card.

Q. Now when you signed the card had you -- had Detective Gossage or Detective Eisenhower or any police officer ever said that you were under arrest?

A. No, he just led me the card and wanted me to sign it.

Q. Did he read the front of that card to you?

A. No, he sat on one end of the desk and I sat on the other. He was looking impatiently for me to sign the card.

Q. Did he show you an arrest warrant?

A. No.

Q. All right. What happened next?

A. I signed the card. So he said "tell me a little bit about what happened." So after he told me that Tim did it, I just said Tim did it.

He said "so why you going to say Tim did it"